Supreme Court, U.S.
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In The
Supreme Court of the United States

LAURA A. FINDLEY, et al.,

Petitioners,

v.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondents' Briefs In Opposition to the Petition For Certiorari illustrate the compelling reasons that Certiorari should be granted. The Petition argues that Certiorari should be granted to address whether the Due Process and Equal Protection Clauses of the United States Constitution apply to limit the use of "selective prospectivity" by a state's highest court in applying its own retroactivity doctrine. This Court, in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 537 (1991) and *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993), held that the practice of "selective prospectivity" in the application of a rule of federal law violated "basic norms of constitutional adjudication."

Respondents argue that this prohibition cannot be extended to state courts because a state's highest court, in its coordinate, co-equal role within the federal system, enjoys absolute, inherent power to decide and apply state law. An important question of federal constitutional law is therefore presented: Does a state's highest court have absolute, inherent power to apply a decision on a question of state law selectively to similarly situated litigants without regard to federal constitutional limitations? As the Petition demonstrates, widespread disagreement on this question exists within the state courts. It is respectfully submitted that Certiorari be granted to address this important systemic question.

THE BRIEFS FURTHER DEMONSTRATE A SUBSTANTIAL CONSTITUTIONAL QUESTION AS TO WHETHER A STATE COURT'S JUDICIAL RETROACTIVITY DOCTRINE IS SUBJECT TO FEDERAL CONSTITUTIONAL LIMITATIONS

Respondents maintain that the states' highest courts have absolute, unlimited freedom to craft their own judicial retroactivity doctrine relying on *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358 (1932). Yet, this Court has repeatedly held that state courts are bound by the federal constitutional limitations of the Fourteenth Amendment. *Brinkerhoff-Faris Trust & Savings v. Hill,* 281 U.S. 673, 682 (1930) (" . . . while it is for the state courts to determine the adjective as well as the substantive law of the state, they must in doing so, accord the parties due process of law"); *Shelley v. Kraemer,* 334 U.S. 1, 15 (1948) quoting Justice Brandeis in *Brinkerhoff-Faris*, 281 U.S. at 680 ("The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government."). As this Court recently explained in *Alden v. Maine,* 527 U.S. 706, 755 (1999), the principle of state sovereignty is limited by the prohibitions of the Fourteenth Amendment. *See also Ex parte State of Virginia,* 100 U.S. 339, 346-348 (1880) explaining this limitation on state sovereignty:

> But in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent . . . But the Constitution now expressly gives authority for congressional interference and compulsion in cases embraced within the Fourteenth Amendment. It is but a limited

> authority, true, extending only to a single class of cases; but within its limits it is complete.

And see Fitzpatrick v. Bitzer, 427 U.S. 445, 454 (1976).

This Court's decision in *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) does not resolve the question whether a state court's use of "selective prospectivity" in its retroactivity doctrine is immune from Fourteenth Amendment limitations. The advent of "selective prospectivity" did not occur until well after *Sunburst* was decided. It had its origin in the 1960s in the criminal procedure context and finally its demise under federal law in the civil context in 1991 in *Beam*. 501 U.S. at 537. ("This method, which we may call modified, or selective, prospectivity, enjoyed its temporary ascendancy in the criminal law during a period in which the Court formulated new rules, prophylactic or otherwise, to insure protection of the rights of the accused."). *Sunburst* involved a state court's use of a "purely prospective" method of overruling. 287 U.S. at 361. As noted in *Beam,* a purely prospective method has been accepted in general, but applied "infrequently." 501 U.S. at 536. Under *Sunburst,* therefore, a state's highest court is free to decide whether one of its decisions may be given retroactive or purely prospective effect. Thus, this Court in *American Trucking Ass'ns, Inc. v. Smith,* 496 U.S. 167, 177 (1990) recognized that "... state courts *generally* have the authority to determine the retroactivity of their own decisions." (emphasis added). However, this Court has never addressed whether the Due Process and Equal Protection Clauses limit the power of state courts to utilize "selective prospectivity" in the application of its retroactivity doctrine.

Clearly, the oppositions' reading of the *Sunburst* doctrine to provide absolute power to state courts to apply state law without regard to any federal constitutional limits appears to conflict with this Court's decisions in *Brinkerhoff-Faris, Shelley* and *Ex parte Virginia.* This conflict further demonstrates that this Court should grant Certiorari in this matter.

The opposition briefs also obfuscate the federal question presented by portraying it as one of construction of state law. Petitioner's question is solely concerned with whether the selective *application* of the construction of W.Va. Code § 33-6-31(k) ("subsection (k)") comports with federal due process and equal protection standards. Petitioner does not attack any construction of state law by the court below.

The state court below in *Mitchell v. Broadnax,* 208 W.Va. 36, 537 S.E.2d 882 (2000) had already construed subsection (k), a provision of West Virginia underinsured motorist law, to provide a cause of action for insureds and then applied the construction retroactively. Based upon this construction, Petitioner asserted the same cause of action. On appeal, the state court below reversed course and determined that its construction of subsection (k) in *Mitchell* was to be applied only prospectively from the date of the *Mitchell* opinion. At the same time, the state court below also held that a new law, W.Va. Code § 33-6-30(b-c) ("HB 4670"), which was enacted to purportedly retroactively overrule the *Broadnax* decision was a substantive law that could not be applied retroactively to bar causes of action based upon the *Broadnax* decision. App. 70-73. The state court below therefore ruled that the *Mitchell* decision applied only to exclusions added to policies of insurance between February 18, 2000, the date of the *Broadnax*

decision and June 7, 2002, the date that HB 4670 was enacted. Because Petitioner's cause of action was based upon exclusions added before this "window period," the state court below said she lacked standing even though the similarly situated plaintiff in *Broadnax* was recognized to have standing. It is this *selective application* of the construction of subsection (k) which raises the federal constitutional question, not the construction itself.

Respondent Nationwide, thus, misstates the holding of the lower court in an effort to avoid the federal constitutional question. Nationwide states that the court below construed the recently enacted HB 4670, the law passed in 2002, to purportedly "overrule" *Broadnax,* to have retroactive effect so as to bar Petitioner's claims. Nationwide Opp. at p. 7. Actually, the state court below held that HB 4670 could only be applied prospectively. Therefore, Petitioner does not dispute or argue with this construction of HB 4670 and it has no relevance to the question presented here.

Nor does Petitioner question the inherent power of the West Virginia Supreme Court of Appeals to craft its own retroactivity doctrine. The state court below enjoys the power to craft a doctrine which allows full retroactive effect or purely prospective effect. However, once the Court makes the retroactive or prospective election in the decision announcing the rule, that decision must be applied to all similarly situated litigants as required by the limitations of the due process and equal protection clauses. Thus, Petitioner presents a question of federal law as explained in *Brinkerhoff-Faris v. Hill,* 281 U.S. 673, 682 (1930) ("We are not now concerned with the rights of the plaintiff on the merits, . . . or with the accuracy of the state court's construction of the statute . . . Our present

concern is solely with the question whether the plaintiff has been accorded due process in the primary sense . . . ").

CONCLUSION

Wherefore, it is respectfully requested that this Honorable Court accept Certiorari.

Respectfully submitted,

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